

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT, ED.N.Y.

BRET SMITH and HAYLEY SMITH.

Plaintiffs,

- against -

JC EHRLICH CO., INC.

Defendant.

BROOKLYN OFFICE
MEMORANDUM DECISION AND
ORDER

CV-02-4785 (BMC)(RLM)

COGAN, District Judge.

Defendant's motion for judgment as a matter of law presents an extremely close question, but ultimately must be denied. Assuming the credibility of plaintiff's testimony that he slipped on a loose drain cover (which the Court is not free to reject on this motion), there is no direct evidence as to how the screws holding the drain cover were removed. Thus, the case requires the fact finder to draw an inference and reject some witness' testimony, no matter which way the factual disputes are resolved. Defendant's argument that an inference in plaintiffs' favor would be speculative is not unfair, but the choice between the conflicting inferences is more properly for the jury.

This is not to say how the Court would have ruled on a new trial motion had the jury returned a verdict in plaintiffs' favor, but "a verdict may not be directed for a defendant merely because the trial judge feels that, should the jury find in plaintiff's favor, he would regard it as his duty in the exercise of a sound judicial discretion, to set the verdict aside." 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §2531 (2d ed. 1995) (quoting O'Donnell v. Geneva Metal Wheel Co., 183 F.2d 733, 739 (6th Cir. 1950)).

The parties are therefore directed to appear for jury selection on February 5, 2007.

SO ORDERED.

/s/(BMC)

Dated: Brooklyn, New York
December 26, 2006

U.S.D/J.